IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15669 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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GUAJRAT STATE CO-OPERATIVE MARKETING FEDERATION LTD. - Petitioner(s)

Versus

SABARKANTHA DIST.CO-OPERATIVE PURCHASE & SALES UNION LTD. - Respondent(s)

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Appearance :

MR SK JHAVERI for Petitioner(s) : 1,
MR VB PATEL, SR. ADVOCATE, MR DG CHAUHAN and MS NAYANA M PATEL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 14/12/2005

ORAL JUDGMENT

1. The present petition has been preferred against the order passed by the Gujarat Cooperative Tribunal, Ahmedabad dated 21st July, 2005 in Appeal No. 618/2002

whereby the order passed by the Board of Nominees, Ahmedabad dated 28/06/2002 in Summary Lavad Suit No. 731/2001 was quashed and set aside and remanded the matter to the Board of Nominees.

2. The facts of the case can be summarized as under :

(i) The petitioner (original plaintiff) had filed Summary Lavad Suit bearing No. 371/2001 before the Board of Nominees, Ahmedabad for recovery of certain some of money against the respondent (original defendant) on the basis of agreement entered into between the petitioner and the respondent under Section 99(4) of Gujarat Cooperative Societies Act, 1961. The Respondent (original defendant) was the member of petitioner (original plaintiff) which is a federal Cooperative society.

(ii) As per the provisions of Act, 1961, leave to defend was granted by the Board of Nominees on condition of deposit of Rs. One Crore by the respondent (original defendant) vide order dated 24/10/2001 below Exhibit – 11 in Summary Lavad Suit No. 371/2001 (Annexure – E to the memo of

the petition).

(iii) Against this order of conditional leave to defend, respondent preferred a Revision Application before the Tribunal and Tribunal granted stay vide order dated 30/10/2001 against conditional order passed by the Board of Nominees (Annexure – F to the memo of the petition). The said order reads as under :

Order

> *"Heard learned Counsels. It is a summary suit and therefore, if award is passed, the Revision Application will become infructuous. Therefore, stay is granted up to 22/11/2001 only, against pronouncement of the final judgment on the board" date 30/10/2001."*

Thus, aforesaid order was passed granting stay against conditional leave to defend. This stay was continued up to 14/06/2002.

(iv) The said Revision Application which was preferred by the present respondent against conditional leave was dismissed for default for want of appearance vide order dated 14/06/2002.

(v) The petitioner (original plaintiff) moved a pursis before the Board of Nominees to take up

the Lavad Suit on Board and for passing an award on 28/06/2002.

(vi) The Board of Nominees, Ahmedabad took the matter on record on the very same day i.e. 28/06/2002 and passed award on 28/06/2002 itself, whereby the suit was decreed in favour of the petitioner (original plaintiff) (Annexure F to the memo of the petition).

(vii) The respondent (original defendant) filed restoration application in Revision Application on 29/06/2002 as revision application was dismissed for default on 14-06-2002. The said restoration application was disposed of by the Tribunal vide order dated 4/6/2002 as infructuous because the decree was already passed by Board of Nominees dated 28/06/2002.

(viii) As restoration application against imposing of condition was dismissed for default, the restoration application was disposed of in view of the decree passed by the Board of Nominees. The respondent preferred an appeal before the Gujarat State Cooperative Tribunal, Ahmedabad

against the order passed by Board of Nominees dated 28/06/2002 under Section 102 of the Act, 1961 mainly on the ground that Board of Nominees has no jurisdiction to entertain, try and decide the Summary Suit, that the procedure adopted by the Board of Nominees is a summary procedure which is not permissible looking to the facts of the case, that there are highly triable issues, and also on the ground that no opportunity of being heard was given to the respondent (original appellant) as envisaged under Section 101 (1) of the Act, 1961. The decree passed by Board of Nominees was also challenged on the ground that there is no liability of the respondent (original appellant) towards the petitioner (original plaintiff), also on the ground that the respondent (original defendant) was a agent and there were Taluka Sanghs who were liable to make the payment to the petitioner, also on the ground that the facts affecting the jurisdiction of the Board of Nominees having not been properly decided by the Board of Nominees, also on the ground that conditional leave order always merges with the final order passed by the Board of Nominees

therefore, all the contentions can be raised by the respondent (original appellant) at the appellate stage, including for the reason that there were several triable issues and therefore, there was no question of conducting the case with summary procedure and therefore, conditional order passed by the Board of Nominees was not warranted looking to the facts of the case and hence, the breach of conditional leave to defend effects not the whole case. On the contrary leave to defend order itself was illegal and on several other grounds appeal was preferred by the respondent before the Gujarat State Cooperative Tribunal.

3. Upon hearing learned Counsels for both the sides, the Tribunal granted stay against the impugned award passed by the Board of Nominees on condition to deposit Rs. Five lakhs. This stay was granted on 12/08/2002 and upon hearing both the sides, the Tribunal quashed and set aside the award passed by the Board of Nominees and remanded the matter to the Board of Nominees for its afresh decision on merits vide order dated 21/07/2005. This order has caused to the petitioner to prefer the present petition.

4. I have heard learned Counsel for the petitioner. Initially contention about maintainability of Appeal before the Tribunal against the award passed in Summary Lavad Suit was raised by the petitioner, but subsequently not pressed by the petitioner. The learned Counsel for the petitioner has submitted that the order passed by Gujarat State Cooperative Tribunal is *de hors* the provisions of the Act, 1961 and *de hors* the facts of the case. It is submitted by the learned Counsel for the petitioner that the Tribunal has erred in coming to the conclusion that there were several triable issues. The Tribunal has also erred in opening a question of leave to defend and the condition attached therewith. It is submitted by the learned Counsel for the petitioner that conditional leave to defend was granted by the Board of Nominees on 30/10/2001 against which a Revision Application was preferred and the same was dismissed on 14/06/2002 and thereafter on 28/06/2002, the Board of Nominees has passed an award in favour of the petitioner (original plaintiff). Thus it was not warranted for the Tribunal to arrive at the conclusion that the leave to defend granting conditional leave was not a legal order passed by the Board of Nominees. Leave to defend order dated 30/10/2001 is a separate and distinct order, it

never emerges with the award passed by the Board of Nominees to leave to defend order as contended. No sooner did the Revision Application was dismissed i.e. On 14/06/2002 and therefore, the Board of Nominees passed an order on 28/06/2002. This aspect of the matter has not been appreciated by the Tribunal. It is also submitted by the learned Counsel for the petitioner that the respondent (original defendant) were liable to make the payment of dues as stated in the memo of Lavad Suit and as stated in the order passed by the Board of Nominees dated 30/10/2001. There is also resolution passed by the respondent, which has been referred in the order passed by the Board of Nominees (Annexure E to the memo of the petition). Thus, on the basis of the agreement, (Annexure B) and the resolution passed by the respondent (Annexure – E) and looking to the nature of transactions and the payments made by the respondent, there was a liability upon the respondent (original defendant) to make payment of a fixed sum as claimed in the Lavad Suit. There was no any uncertainty as to the liability of the respondent. This aspect of the matter has not been appreciated by the Tribunal and has committed an error, apparent on the face of the record, that there are several triable issues, that the condition attached with leave to defend has been opened by the Tribunal while passing impugned order

dated 21/07/2002. Learned Counsel appearing for the petitioner has also taken this Court to various sections of the Act especially Section 99 and the provisions of the Code of Civil Procedure and several judgments and pointed out that the order passed by the Tribunal is illegal and there are several errors apparent on the face of the record and order passed by the Tribunal dated 21/07/2005 in Appeal No. 618/2002 deserves to be quashed and set aside and the order passed by the Board of Nominees, Ahmedabad in Summary Lavad Suit No. 713/2001 dated 28/06/2002 may be restored.

5. I have heard learned Counsel for the respondent who has mainly submitted that the order passed by the Tribunal is true, legal and in consonance with the facts and the provisions of the Act, 1961. It is also submitted by the learned Counsel for the respondent that under the agreement (Annexure B colly, to the memo of the petition) there is no liability of the respondent (original defendant) to make the payment of chemical fertilizers which has been used and consumed by Taluka Sangas. The present respondent has not purchased any item from the petitioner (original plaintiff). It is also submitted by the learned Counsel for the respondent that there is no single clause in the agreement between the petitioner and

the respondent which imposes any liability upon the respondent for the payment of chemical fertilizers which are purchased by Taluka Sanghas. On the contrary looking to the various clause, the liability of the respondent (original defendant) was a very limited one and was only to the fact that the respondent was an agent for the sale of the chemical fertilizers from petitioner to Taluka Sanghs and as and when payment was received from Taluka Sanghs it was to be forwarded to the petitioner. In case of default by Taluka Sanghs, suit was required to be filed by the Respondent against the Taluka Sanghas as per the terms of the agreement.

6. Learned Counsel for the respondent has taken this Court to several clauses of the agreement and has pointed out at length that only liability of the respondent was like a Recovery agent for the items sold from the petitioner to Taluka Sanghs. If there is any recovery from Taluka Sanghs, the said amount cannot be retained by the respondent, it ought to be forwarded to the petitioner failing which some penal interest was to be followed from the respondent by the petitioner. At the most, there can be case of negligence on the part of the respondent in making a recovery from the purchaser – Taluka Sanghs. The respondent is not debtor of the

petitioner at all. The respondent is not purchaser of any chemical fertilizers. The main base of the suit filed by the petitioner before the Board of Nominees was to the liability of the respondent under the agreement, in fact looking to the agreement, nature of transactions, correspondence and the resolutions, there was no responsibility of the respondent of the payment of dues to the petitioner for the sale of chemical fertilizers. On the contrary this was a main triable issues and highly contentious issue before the Board of Nominees. Before imposing any liability upon the respondent, clauses of the agreement, correspondence and the resolutions (Annexure – E to the memo) deserves to be read and re-read at a great length. The main issue of the liability of the respondent was highly contentious issue. The liability is not admitted. The liability of the respondent is not admitted liability for default in payment by those who have purchased chemical fertilizers. This aspect of the matter has not been appreciated by the Board of Nominees on both levels viz. while passing leave to defend order dated 30/10/2001 and also order dated 28/06/2002. The liability of the respondent cannot be presumed by the Board of Nominees. Lavad case filed by the petitioner therefore, ought to have been dismissed summarily by the Board of Nominees. The conditional facts

referred in Section 99 of the Act, 1961 and especially under Sub-section (4) thereof were never present before the Board of Nominees and therefore, conditional leave to defend order was challenged in the Revision Application by the respondent. Initially stay was granted by the Tribunal but the said Revision Application was dismissed for default on 14/06/2002. On 28/06/2002, the petitioner moved a pursis for hearing of Lavad Case, suddenly without hearing the defendant i.e. the present respondent, on the very same day for the reasons best known to the petitioner, the Lavad Suit was finally decided on 28/06/2002 by the Board of Nominees, Ahmedabad. As per Section 101(1) of the Act, 1961, opportunity of being heard ought to have been afforded by the Board of Nominees to the respondent. Neither copy of the pursis was given on the same day nor respondent was heard on the same day, Board of Nominees finally decided Summary Lavad Suit *ex-parte* in favour of the petitioner (original plaintiff) and passed decree on the same day against the respondent. Learned Counsel appearing for the respondent has also pointed out that even if the condition is not fulfilled by the respondent as per leave to defend order, it was prime duty of the Board of Nominees to look into the facts of the case and evidence of the case and thereafter ought to have come to the

conclusion as to the liability of the respondent. But looking to the order passed by Board of Nominees dated 28/06/2002 nothing has been seen discussed in the award passed by the Board of Nominees. Therefore, the appeal was preferred before the Tribunal wherein all the points were raised by the respondent and pointed out that procedure adopted by the Board of Nominees was absolutely wrong and illegal. Similarly, procedure adopted by the Board of Nominees was not warranted looking to the facts of case and the contentious issues. Looking to the agreement there is no liability of the respondent (original defendant) for purchase of the chemical fertilizers. In fact the respondent was never purchaser of the chemical fertilizers. Respondent was a agent, even as per correspondence entered into between the parties and letters written by the petitioner (original plaintiff). Some of the letters are at (Anneuxre – B dated 28/10/1993, Annexure – C dated 6/1/1996, Annexure – D dated 05/05/2001 to the memo of the petition) makes the fact crystal clear that even as per petitioner (original plaintiff), the respondent (original defendant) was not a debtor of dues as alleged by the petitioner (original plaintiff). He was merely an agent of sale of chemical fertilizers from the petitioner to Taluka Sanghs. If Taluka Sanghs make the payment, it was to be forwarded to

the petitioner. In any case if there is no payment or default by Taluka Sanghs, as per the clause 11(10) of the agreement, the respondent (original defendant) was liable to file suits against the defaulters. In fact such suits have been filed by the respondent (original defendant) against such defaulted Taluka Sanghs. Even claims have been raised by the respondent before the Official Liquidator of the concerned Talukas Sanghas. Even the petitioner (original plaintiff)has also raised their claim before the Official Liquidator of Taluka Sanghas, whatever payment have been received from Official Liquidator has been forwarded by the respondent to the petitioner. It is also submitted by the learned Counsel for the respondent that the whole case cannot be tried summarily by the Board of Nominees. The conditions referred in Sub-section (4) of Section 99 of the Act, 1961 were not fulfilled, even if the case of the petitioner (original plaintiff) is taken at its highest pitch, maximum it can be said that the respondent was negligent in making recovery from Taluka Sanghs, but this conclusion also cannot be arrived at because the respondent has already filed suits against defaulters. There is much difference between the debtors and the Recovery Agent, the respondent is not at all defaulter of the petitioner looking to the nature of agreement. On the

contrary the respondent was entitled to claim commission for the sale of chemical fertilizers and if the purchaser is making payment the same was to be sent to the petitioner, thus, this aspect has been made in the order dated 21/07/2005 passed by the Tribunal and the matter has been remanded to the Board of Nominees for conducting Lavad Suit on its own merits and not summarily. The reasons given by the Tribunal for passing the impugned order are true, correct and in consonance with the agreement and correspondence as stated hereinabove. Therefore, said order may not be quashed by this Court in exercise of jurisdiction under Article 227 of Constitution of India. There are certain observations made by the Tribunal, on the basis of facts this factual findings of the Tribunal may not be disturbed by this Court as the matter has been remanded and stipulated time has been given by the Board of Nominees. The case ought to be allowed to be tried by the Board of Nominees on its own merits. Learned Counsel for the respondent has also taken this Court to several judgments which are referred hereinafter and has pointed out that interim order passed by the Board of Nominees dated 30/10/2001 whereby conditional leave to defend was granted is emerging with the final order and when the final order is not challenged the conditional leave to defend order can also

be challenged by the respondent. There are judgments which are cited by the learned Counsel for the respondent which touches aspect to the fact that whenever there is an error in arriving at correct facts which are known as “jurisdictional facts”, the said issue can be raised in an appeal and the appellate Court has all power, jurisdiction and authority to decide the same viz. Whether the “jurisdictional facts” were ever in existence, before the Board of Nominee, while adopting summary procedure in pending Lavad Case. Looking to the facts of the present case, the conditions referred in Sub-section (4) of Section 99 were not fulfilled. The case filed by the petitioner cannot be tried summarily and it requires a hearing on its own merits after laying down the evidence, the suit ought to have been decided. The order passed by the Tribunal is true, correct and may not be quashed by this Court.

7. Having heard the Counsels for both the sides, looking to the facts and circumstances of the case, keeping in mind the provisions of the Gujarat Cooperative Societies Act, 1961, the Gujarat Cooperative Rules, 1965, the provisions of Code of Civil Procedure, 1907, various judicial pronouncements and orders passed by the Board of Nominees, Ahmedabad dated 24/10/2001 and 28/6/2002, the

order dated 21/07/2005 in Appeal No. 618/2002 passed by Gujarat Cooperative Tribunal, I see no reason to entertain the present petition in exercise of jurisdiction under Article 227 of the Constitution of India at this stage (because, the case is remanded by the Tribunal to the Board of Nominees, Ahmedabad) especially for the following facts and reasons:

(i) The present petitioner (original plaintiff) preferred Lavad Suit before the Board of Nominees against the respondent (original defendant) bearing Summary Lavad Case No. 731/2001. Thereafter, below Exhibit – 11 leave to defend order was passed vide order dated 24/10/2001. Conditional leave to defend was granted to the respondent and condition was to deposit Rs. One Crore. Against the said conditional leave to defend, a Revision Application was preferred before the Tribunal, initially Tribunal granted stay against conditional leave to defend vide order dated 30/10/2005. The Tribunal passed the following order :

“Order

Heard the learned advocates. It is a summary suit and therefore if the award is passed the R.A. Will become infructions. Therefore stay is granted upto 22-11-2001 only against pronouncement of final judgment and award.

Date : 30/10/2001.”

(ii) This Revision Application No. 468/2001 was preferred against leave to defend order passed by the Board of Nominees, this was dismissed for default vide order dated 14/06/2002. Thus, the stay granted by the Tribunal was not operative on and from 14/06/2002. The present petitioner (original plaintiff) moved a pursis to take up the Lavad Suit on Board before the Board of Nominees, this pursis was moved on 28/06/2002. The Board of Nominees had taken the matter on Board on the very same day and passed an *ex-parte* award in favour of the present petitioner (original plaintiff) and this is how the suit was decreed on 28/06/2002 whereby it was ordered that the respondent (original defendant) has to make payment of Rs. 3,04,98,712. 85 paise with interest at the rate of 16 percent with effect from 09/05/2001 plus cost of the suit of Rs. 6000/- . Looking to the facts of the present case prima facie there was no hearing afforded

by the Board of Nominees to the respondent (original plaintiff). The pursis was moved on 28/06/2002 by the present petitioner (original plaintiff), the Board of Nominees has not taken any care even to see that such pursis has either been served upon the respondent. Even if the conditional leave to defend order is not fulfilled, there are certain obligations upon the Board of Nominees as per Section 99 (5) of the Act, 1961. Section 99 (5) of the Act, 1961 reads as under:

"99. xxx... 1 to 4 xxx....

5. (a) The defendant shall not be entitled to defend the dispute unless he obtains leave from the Registrar, his nominee, or as the case may be, the board of nominees, in such manner as may be prescribed.

(b) The Registrar, his nominee or board of nominees may grant the leave under clause (a) on such conditions, as he thinks fit.

(c) The Registrar, his nominee or board of nominees shall not refuse the leave to defend the dispute unless he is satisfied that the facts disclosed by the defendant do not indicate that he has substantials defence to raise or that the defence intended to be put by him is frivolous or vexatious.

(d) Where the defendant fails to obtain such leave or fails to appear or defend the dispute in pursuance of such leave, the averments made in the

plaint and documents produced therewith shall be deemed to have been admitted by the defendant:

Provided that the Registrar, his nominee or board of nominees in his discretion requires any fact so admitted to be proved otherwise than by such admission.

(e) Where the conditions on which leave to defend is granted are not complied with by the defendant, the Registrar, his nominee or, as the case may be, board of nominees may pass an award against him, as if he has not been granted such leave."

In view of the aforesaid provisions the Board of Nominees has to use it discretion to find out the true facts. This care has not been taken by the Board of Nominees. Looking to the order dated 28/6/2002 admission of facts of non fulfillment of conditional leave to defend order is one thing and it is altogether other aspect of the matter, that before passing final decree, the Board of Nominees has to use its discretion on the facts, stated in the memo of the summary Lavad Suit. The discretion which vested in the Board of Nominees is coupled with the duty to find out the correct facts. There is also in-built mechanism under Section 101 of the Act, 1961 to provide opportunity of being heard to the parties. Admittedly, no such opportunity has

been afforded by the Board of Nominees to the respondent. There is breach of principles of natural justice. What was the hurry in the mind of the Board of Nominees as to pass *ex-parte* decree on the date on which the pursis was filed is not reflected from the order. Such hurry could have been avoided by the Board of Nominees. Adequate opportunities of being heard is bare minimum requirement for adjudication of the dispute. There is no such provision in the whole Act, 1961 that when condition imposed in, conditional leave to defend order, is not fulfilled the said parties should not be heard at all. Whenever there is breach of condition imposed in conditional leave to defend under Section 99 of the Act, 1961, always the award is to be passed under Section 101 of the Act, 1961 and as per Section 101, the respondent have right to be heard and there is admittedly, breach of such right of the respondent. Therefore, order passed by Board of Nominees has been correctly upset by the Tribunal vide order dated 21/07/2005.

(iii)It is also contended vehemently by the learned

Counsel for the petitioner that conditional leave to defend order passed by the Board of Nominees dated 30/10/2001 was not challenged and therefore, it has attained its finality and therefore, when the award is passed by the Board of Nominees in an appeal arising therefrom the issue can never be opened by the Tribunal whether leave to defend was granted correctly or not. This contention is not accepted by this Court. Always interim orders passed by the Court merges with the final order, the fact which affects the basic jurisdiction of the Court can be reappreciated in an appeal. It is contended by the respondent (original defendant) that the procedure adopted by the Board of Nominees i.e. Summary method itself was wrong looking to the contentious issues raised by the respondent. I have perused the agreement between the petitioner (original plaintiff) and the respondent (original defendant), the correspondence between the them and looking to the peculiar facts and various clauses of the agreement entered into between the parties, I am of the opinion that the conclusion arrived at by the Tribunal vide order dated 21/07/2005 is

absolutely true, correct, legal and in consonance of the facts of the case. As the matter has been remanded by the Tribunal for afresh decision by the Board of Nominees this Court is not analysing in detail the facts of various clauses of the agreement. Suffice it to say at this stage that Clause 4,8,11,12 and the like of the agreement between the parties make the issue raised by the respondent triable issue. The liability of the respondent as an agent as stated in the agreement is required to be crystallized by the Board of Nominees. Important fact whether the respondent was working as an agent or was a purchaser of the chemical fertilizers from the petitioner itself is a highly contentious issue and it is important tribal issue. There is also further correspondence between the parties which of course requires no further analysis except the mentioning of the fact that the letter written by the petitioner (original plaintiff) dated 28/10/1993, 06/01/1996, 5/5/2000 are also leading to the fact that it is not admitted position of fact that the respondent was a purchaser of the chemical fertilizers. Issue

raised by the respondent (original defendant) that the respondent was working only as an agent for selling chemical fertilizers to Taluka Sanghas and whatever payment Taluka Sanghas were making, the said payment was transferred to the petitioner (original plaintiff) and the respondent were entitled only for the commission. The conclusion arrived at by the Tribunal especially in paragraph (page – 8) of the order is true and correct. The reasons advanced by the Tribunal upon the analysis of the agreement are also true and correct. This fact affects directly the jurisdiction of the Tribunal to conduct the case summarily under Section 99 of the Act, 1961. As per Sub-section (4) of Section 99 there are four types of situation which must admittedly be present and then only case can be tried summarily by the Board of Nominees. Thus, as stated hereinabove looking to the facts of the case, the agreement between the parties and further correspondence between the parties, circumstances enumerated in Sub-section (4) of Section 99 of the Act, 1961 were not present and therefore, it is rightly held by the Tribunal that Board of Nominees

ought to have decided the whole case on its own merits and after giving opportunity of being heard to the respondent. Summary procedure adopted by the Board of Nominees, looking to the facts and circumstances of the case, was not warranted. Neither of the circumstances of Sub-section (4) of Section 99 were present in this case. Therefore, conditional leave to defend order could not have been passed by the Board of Nominees. This conclusion arrived at by the Tribunal is true and correct and in consonance with the facts of the case.

(iv) It has been held by Hon'ble Supreme Court in ***Executive Officer, Arthanareshwarar Temple v. R. Sathyamoorthy and Others reported in (1999) 3 SSC 115*** especially in paragraph 20 as under:

> *"20. In the present case, the District Court has no doubt not granted permission to sell but it has proceeded on the basis that it has jurisdiction in relation to the subject-matter of the OP. In our view, the District Courts' jurisdiction under Section 34 of the Trusts Act depends upon the decision as to the nature of the property in question. By wrongly deciding its nature, the District Court cannot assume jurisdiction upon itself to grant permission for sale. Whether the District Court has wrongly decided the jurisdictional fact or not can certainly*

be gone into in jurisdiction under Section 115 Code of Civil Procedure. It has been held by this Court in Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi that even in matters arising under Section 115 CPC, the High Court can certainly decide whether jurisdictional facts have been correctly decided by the subordinate court or not, on the basis of the well-known principles laid down by Lord Esher, M.R. In R. v. CIT. There can, therefore, be no jurisdictional flaw in directing the High Court to decide these issues. In view of the consent order passed by this Court earlier in the civil appeal, if it is felt that some more evidence is necessary, it will be open to the High Court to receive the same directly or direct the District Court to record such oral or documentary evidence as the parties may want to adduce and have the same brought up to the High Court for use in the revision for decision on these issues."

Thus, from the aforesaid judgment if the lower Court has wrongly decided the jurisdictional facts, it can be corrected by the higher forum. Looking to the facts of the present case, conditions envisaged under Sub-section (4) of Section 99 of the Act, 1961 are pertaining to jurisdictional facts. If these facts are absent, the procedure adopted by the Board of Nominees to conduct the suits summarily is also wrong. This can be very well rechecked and reappreciated by the appellate forum.

(v) It has been held by Hon'ble Supreme Court in

Ebrahim Aboobakar and another v. Custodian General of Evacuee Property, New Delhi reported in AIR 1952 SC 319, especially paragraph 14 thereof as under:

> *"(14) It was contended that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit of its jurisdiction depends and that the question involved in the appeal before the respondent were collateral to the merits of the case. As pointed out by Lord Esher, M.R. In REG v. INCOMETAX COMMISSIONERS', (1888) 21 Q B D 313, the formula enunciated above is quite plain but its application is often misleading. The learned Master of the Rolls classified the cases under two categories thus:*
>
> *"When an inferior court or tribunal or body which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exits, as well as the jurisdiction', on finding that it does exist to proceed further or do something more. When the legislature are establishing such a tribunal or body with*

limited jurisdiction, they also have to consider whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

The tribunal constituted to hear appeals under Section 24 has been constituted in these terms:

"Any person aggrieved by an order made under section 7, section 16, section 19 or section 38 may prefer an appeal in such manner and within such time as may be prescribed"

(a) to the Custodian, where the original order, has been passed by a Deputy or Assistant Custodian;
(b) to the Custodian-General, where the original order has been passed by the Custodian an Additional Custodian or an Authorized Deputy Custodian".

Like all courts of appeal exercising general jurisdiction in civil cases, the respondent has been constituted an appellate court in words of the widest amplitude and the legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts. Ordinarily, a court of appeal has not only jurisdiction to determine the soundness of the decision of the inferior court as a court of error, but by the very nature of things it has also jurisdiction to determine any points raised before it in the nature of preliminary issues by the parties. Such jurisdiction is inherent in

its very constitution as a court of appeal. Whether an appeal is competent, whether the appeal in substance is from one or another order and whether it has been preferred in proper form and within the time prescribed, are all matters for the decision of the appellate court so constituted. Such a tribunal falls within class 2 of the classification of the Master of the Rolls. In these circumstances it seems to us that the order of the High Court of Punjab that a writ of 'certiorari' could not issue to the respondent quashing the order of the 13th May 1950 was right. We are further of the opinion that none of the contentions raised has any merit whatsoever".

In view of the aforesaid judgment when any tribunal or authority exercising limited jurisdiction, the facts, giving the jurisdiction, if are wrongly appreciated they can be correctly re-appreciated by the higher forum. The facts which gives jurisdiction to the tribunal ought to have been held, as present, while passing final order. Looking to the order passed by the Board of Nominees on dated 28/06/2002 no such satisfaction has been mentioned in the order passed by the Board of Nominees. Therefore, the order has be rightly quashed and set aside by the Tribunal.

(vi) It has been held by Hon'ble Supreme Court in ***Trimbak Narayan Hardas v. Babulal Motaji and***

other reported in AIR 1973 SC 1363 especially paragraph 3 as under:

> *"3. Jangli, who was defendant no.1, filed his written statement on behalf of himself and as the guardian of his minor sons. In this written statement, he admitted practically all the allegations of the plaintiff. On the other hand, disputed the award in favour of Hardas. After this the plaintiff found that the interests of Jangli and his minor sons were conflicting and, therefore, applied for the representation of the minors by their mother. The mother contested the suit denying the transaction with the plaintiff or the receipt of the money. She further alleged that there was no legal necessity or benefit to the estate and hence the minor sons were not bound by the agreement. Hardas, defendant no.6, affirmed his transaction as a genuine one and alleged that the suit was a collusive suit between plaintiff and defendant no.1 with a view to defeat defendant no. 6. It was suggested that there was really no genuine transaction of an agreement to sell and the document must have come into existence sometimes when the execution petition had been filed by defendant no.6 against defendant no.1. It is necessary to note here that after filing the plaintiff's claim defendant no.1 did not take part in the further proceedings. Thus there was a double contest – one between the plaintiff and the minor sons of Jangli; another between the plaintiff and Hardas."*

As per the aforesaid judgment, it has been for the higher forum to verify whether the facts giving jurisdiction to the tribunal has been correctly decided or not. The agreement,

correspondence as stated hereinabove clearly reflected that the conditions referred in Section 99 (4) of the Act, 1961 were not present. This aspect has not been appreciated by the Board of Nominees and therefore, order has been correctly quashed and set aside by the tribunal and the matter has been rightly remanded by the tribunal for its afresh decision on merits of the case.

(vii) It has been held by the Supreme Court in ***Shrisht Dhawan v. Shaw Brothers reported in (1992) 1 SSC 534*** especially paragraph 19 as under:

> *"19. All these decisions were examined in Shiv Chander Kapoor. The Bench explicitly ruled out sufficiency of accommodation or bona fide need, provided for in S. 14, as beyond scope of the enquiry under S. 21 of the Act. It was held that the invalidity which could vitiate sanction was error in jurisdictional fact at the time of grant of permission, as valid sanction was sine qua non for Controller's jurisdiction. What then is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a Court, Tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a Court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional*

fact. No statutory authority or tribunal can assume jurisdiction in respect of subject-matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the Court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad. In Raza Textiles it was held that a Court or Tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly. What are those facts which can be said to be jurisdictional fact under S. 21? Although the section visualises four conditions, namely, that the landlord does not require the whole or part of premises for a particular period', the landlord must obtain the permission of the Controller in the prescribed manner, letting of the whole or part of the premises must be for residence and such letting must be for such period as may be agreed between the landlord and the tenant in writing. But the jurisdictional fact can be said to be two, availability of vacant premises which are not required by the landlord for the particular period and its letting out for residential purpose. For instance a permission obtained under S. 21 may be vitiated if the premises were not vacant on the date of application. Similarly if the permission is obtained in respect of non-residential premises. What is significant is that the declaration by the landlord that the premises were available for letting out for short period is not required to be backed by any reason. And an application filed under S. 21 with or without reasons is neither bad nor contrary to law. It may be accompanied by statement of reasons or the application may merely state that the landlord does not require the premises for the period mentioned therein. In either case the application shall be in accordance with law. And if the Controller is satisfied that what was stated was correct he is obliged to grant permission. This satisfaction may be arrived at by believing the statement or requiring a landlord to give reasons or furnish such

information as the Controller may consider necessary to satisfy himself that the statement made by landlord was correct. But once satisfaction is arrived at and the order is passed it becomes operative and final. It cannot be re-opened because of mere mistake or error or in the circumstances a more reasonable approach should have been to reject the application or allow it after obtaining better details. Error in assumption of jurisdiction should not be confused with mistake, legal or factual in exercise of jurisdiction. In the former the order is void whereas in the latter it is final unless set aside by higher or competent Court or authority. An order which is void can be challenged at any time in any proceeding. A permission granted under S. 21 once permitted to attain finality becomes unassailable on error in exercise of jurisdiction. It could be challenged later or in execution only if it could be brought in the category of a void or ultra vires permission. Such invalidity can arise if jurisdiction is exercised by misrepresentation of facts either about existence of vacancy or nature of premises. In other words what attains finality in accordance with law cannot be permitted to be reagitated or reopened except in the larger social interest of preventing a person from practising deceit. Therefore an error of jurisdictional fact which could entitle a Controller to re-examine the matter in the context of S. 21 is the same, namely, fraud or collusion. Ratio to this extent was reiterated and accepted as correct exposition of law in Shiv Chander Kapoor. It has to be understood as such."

This judgment also reflects the fact that jurisdictional facts, if wrongly decided by the tribunal can always be corrected by the higher forum. The consistent view as stated hereinabove

has been properly appreciated by the Tribunal and I see no reason to interfere with the order passed by the Tribunal dated 21/07/2005. The order by the Board of Nominee as to the jurisdictional facts rendered order *ultra vires* the facts and bad in eye of law and violative of Section 99 (4) of the Act, 1961.

8. The contentions raised by the learned counsel for the petitioner that once order of leave to defend is passed and is not challenged by the respondent it attains its finality and when the final award is passed, the same issue cannot be raised by the respondent in an appeal. This attracted contention if is looked closely is not true and is incorrect and therefore, is not accepted by this Court. Always interim order merges with the final order. The final order can be challenged by the respondent under Section 102 of the Act, 1961 and in the appeal before the Tribunal all the issues can be raised by the respondent including that of the fact that conditions envisaged under Sub-section (4) of Section 99 of the Act, 1961 were not present. Therefore, conditional leave to defend order and the final award deserves to be quashed and set aside. This contention is always open to the respondent (original defendant) at the time of

hearing of the appeal under Section 102 of the Act, 1961 before the Tribunal and stated hereinabove it has been correctly appreciated by the Tribunal by analyzing various clauses of the agreement and the correspondence that affects the jurisdiction of the Board of Nominees to try the case summarily, and therefore, correctly the whole case has been remanded to the Board of Nominees for its afresh decision after giving opportunity of being heard to the respondent. Learned Counsel for the petitioner has also relied upon the case decided by various Courts:

(i) AIR 1930 (8) Nagpur 254
(ii) AIR 1968 Kalkota 247
(iii)AIR 1969 Gujarat 18
(iv) AIR 1989 Bombay 150

And has raised contention that no appeal / revision can lie against conditional leave to defend order and subsequently the respondent can be restrained from raising such plea. Looking to the peculiar facts of the present case, the agreement and the correspondence between the parties, the cases cited by the learned Counsel for the petitioner are not helpful to the petitioner especially in view of the judicial pronouncements as discussed hereinabove. As the matter has been remanded for its afresh decision this Court is

avoiding going into the fine nicety of facts and the appreciation thereof.

9. As a cumulative effect of the facts and circumstances of the case, judicial pronouncements referred hereinabove, there is no substance in the present petition, therefore, the order passed by the tribunal dated 21/07/2005 is true, correct and in consonance of the fact and law, there is no error in the said judgment much less error apparent of the record. Petition therefore, fails. Notice discharged. Interim relief granted, if any, stands vacated.

10. At this stage, learned Counsel for the petitioner has placed reliance upon the judgment in ***Gordon Woodroffe and Co. v. Shaik M.A. Majid and Co. reported in AIR 1967 SC 181*** and as submitted that the liability of the agent is co-extensive that of principle borrower and therefore, respondent (original defendant) are liable to make the payment of. Similarly one more case is cited by the learned Counsel for the petitioner i.e. ***Superintendent of Stamps v. Ramkrishnalal Dahyabhai reported in AIR 1947 Bombay 343***. Suffice it to say that the liability of the agent is not unknown even under the Contract Act but the facts remain whether the respondent is liable or not.

Looking to the nature of agreement and various clauses stated hereiabove and further correspondence between the parties, I am of the opinion that facts of the present case are such that it ousts limited jurisdiction of Board of Nominees to try the case summarily.

11. Learned Counsel for the petitioner has requested to continue Interim relief granted by this Court for some period. This request is objected by the learned Counsel appearing for the respondent. Looking to the reasons stated hereinabove, the request made by the learned Counsel for the petitioner is not accepted by this Court. The matter has been remanded by the tribunal to the Board of Nominees for afresh decision upon Lavad case filed by the petitioner on its own merits and after giving opportunity of being heard.

[D.N.PATEL, J.]

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